

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Aug 19, 2024

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

REBECCA S.,¹

Plaintiff,

v.

MARTIN O'MALLEY, Commissioner of
Social Security,

Defendant.

No. 1:24-CV-03039-EFS

**ORDER REVERSING THE ALJ'S
DENIAL OF BENEFITS, AND
REMANDING FOR FURTHER
PROCEEDINGS**

Due to major depressive disorder, generalized anxiety, social anxiety, Bipolar I disorder, Arnold-Chiari malformation, headaches, lupus, and arthritis in her back, Plaintiff Rebecca S. claims that she is unable to work full-time and applied for disability insurance benefits and supplemental security income benefits. She appeals the denial of benefits by the Administrative Law Judge (ALJ) on the grounds that the ALJ improperly denied her claims at step two and did not

¹ For privacy reasons, Plaintiff is referred to by first name and last initial or as "Plaintiff." See LCivR 5.2(c).

properly complete the five-step evaluation. As is explained below, the ALJ erred. This matter is remanded for further proceedings.

I. Background

In April 2021, Plaintiff filed an application for benefits under Title 2, and in May 2021, Plaintiff filed an application for benefits under Title 16, with both claiming disability beginning July 5, 2018, based on the physical and mental impairments noted above.² Her claims were denied at the initial and reconsideration levels.³

After the agency denied Plaintiff benefits, ALJ Jo Hoennenger held a telephone hearing in May 2023 at which Plaintiff appeared with her representative.⁴ Plaintiff testified, and a vocational expert testified.⁵

After the hearing, the ALJ issued a decision denying benefits.⁶ The ALJ found Plaintiff's alleged symptoms were not entirely consistent with the medical evidence and the other evidence.⁷ As to medical opinions, the ALJ found:

² AR 206, 220, 222, 232, 281.

³ AR 123, 128, 135, 138.

⁴ AR 46-76.

⁵ *Id.*

⁶ AR 14-38. Per 20 C.F.R. §§ 404.1520(a)–(g), 416.920(a)-(g), a five-step evaluation determines whether a claimant is disabled.

⁷ AR 24-27.

- 1 • The opinions of state agency evaluators Norman Staley, MD, and
2 Mark Magdaleno, MD, to be persuasive.
- 3 • The opinion of state agency evaluator Carol Moore, PhD, that Plaintiff
4 could understand and perform simple and repetitive tasks throughout
5 an eight-hour workday; could have brief and superficial interactions
6 with the general public, coworkers, and supervisors; could respond
7 appropriately to infrequent changes in the workplace; and could be
8 aware of hazards, travel independently, and follow goals set by
9 supervisors to be persuasive.
- 10 • The opinion of state agency evaluator Renee Eisenhower, PhD, that
11 Plaintiff could understand, recall, and execute both simple and
12 detailed tasks for 2-hour increments of time with regular breaks
13 during a normal 8-hour workday; perform work that does not require
14 interaction with the public as an essential element of the job; tolerate
15 occasional incidental contact with the public; and would be capable of
16 responding appropriately to occasional unpredictable changes and
17 work setting changes to be persuasive.
- 18 • The opinion of state agency evaluator Renee Eisenhower, PhD, that
19 there was insufficient evidence to evaluate the claim on or before the
20 date last insured to be unpersuasive.
- 21 • The opinions of consultative examiner Lisa Benton, ARNP, to be
22 generally persuasive.

- 1 • The opinions of consultative examiner Jenifer Schultz, PhD, to be not
2 persuasive.
- 3 • The opinions of treating psychologist Christopher Waters, PhD, which
4 she incorrectly attributed to a non-medical state worker Amber
5 Ladiges, to be not persuasive.
- 6 • The opinions of Christopher Waters, PhD, which were properly
7 attributed to Dr. Waters to be neither valuable no persuasive.
- 8 • The opinion of consultative examiner David Morgan, PhD to be not
9 persuasive.⁸

10 The ALJ also evaluated the third-party witness statement of Plaintiff's mother and
11 found it to be inconsistent with the evidence.⁹ As to the sequential disability
12 analysis, the ALJ found:

- 13 • Plaintiff met the insured status requirements through December 31,
14 2019.
- 15 • Step one: Plaintiff had not engaged in substantial gainful activity
16 since July 5, 2018, the alleged onset date.
- 17 • Step two: Plaintiff had the following medically determinable
18 impairments: lumbar degenerative disc disease, fibromyalgia, obesity,
19

21 ⁸ AR 28-31.

22 ⁹ AR 31.

1 lupus, generalized anxiety disorder, social anxiety, and bipolar I
2 disorder.

- 3 • Step three: Plaintiff did not have an impairment or combination of
4 impairments that met or medically equaled the severity of one of the
5 listed impairments.

- 6 • RFC: Plaintiff had the RFC to perform light work with the following
7 exceptions:

8 [Plaintiff] can frequently climb ramps and stairs; should not
9 climb ladders, ropes, or scaffolds; can frequently balance, stoop,
10 kneel, crouch and crawl; can tolerate frequent exposure to
11 airborne irritants (such as fumes, odors, dusts, gases and poor
12 ventilation) and hazards (such as unprotected heights and
13 exposed moving mechanical parts); can understand and
14 remember simple instructions; has sufficient concentration,
15 persistence, and pace to complete simple, repetitive tasks for a
16 normal workday and workweek; can tolerate occasional
17 superficial interactions with coworkers, supervisors, and the
18 general public; can tolerate occasional changes in the work place;
19 and can follow employer-set goals.

- 20 • Step four: Plaintiff has no past relevant work.
- 21 • Step five: considering Plaintiff's RFC, age, education, and work
22 history, Plaintiff could perform work that existed in significant
23 numbers in the national economy, such as a cleaner, housekeeper
(DOT 323.687-014), a small products assembler II (DOT 739.687-030),
and an ironer (DOT 302.687-010).¹⁰

22 ¹⁰ AR 19-33.

1 Plaintiff timely requested review of the ALJ's decision by the Appeals
2 Council and now this Court.¹¹

3 II. Standard of Review

4 The ALJ's decision is reversed "only if it is not supported by substantial
5 evidence or is based on legal error,"¹² and such error impacted the nondisability
6 determination.¹³ Substantial evidence is "more than a mere scintilla but less than a
7 preponderance; it is such relevant evidence as a reasonable mind might accept as
8 adequate to support a conclusion."¹⁴

11 ¹¹ AR 204.

12 ¹² *Hill v. Astrue*, 698 F.3d 1153, 1158 (9th Cir. 2012). *See* 42 U.S.C. §§ 405(g),
13 1383(g).

14 ¹³ *Molina v. Astrue*, 674 F.3d 1104, 1115 (9th Cir. 2012), *superseded on other*
15 *grounds by* 20 C.F.R. §§ 404.1520(a), 416.920(a) (recognizing that the court may
16 not reverse an ALJ decision due to a harmless error—one that "is inconsequential
17 to the ultimate nondisability determination").

18 ¹⁴ *Hill*, 698 F.3d at 1159 (quoting *Sandgathe v. Chater*, 108 F.3d 978, 980 (9th Cir.
19 1997)). *See also* *Lingenfelter v. Astrue*, 504 F.3d 1028, 1035 (9th Cir. 2007) (The
20 court "must consider the entire record as a whole, weighing both the evidence that
21 supports and the evidence that detracts from the Commissioner's conclusion," not
22 simply the evidence cited by the ALJ or the parties.) (cleaned up); *Black v. Apfel*,

III. Analysis

Plaintiff seeks relief from the denial of disability on four grounds. She argues the ALJ erred when she failed to consider that her Arnold Chiari malformation caused her to experience frequent migraine headaches. Additionally, Plaintiff asserts that the ALJ erred in her evaluation of the medical opinions regarding Plaintiff's mental impairments, erred in her evaluation of Plaintiff's testimony, and erred by not properly addressing the listings. The Commissioner counter argues there was no error because Plaintiff has the burden to prove at step two specific limitations and did not do so, that the ALJ properly considered that Plaintiff's testimony was inconsistent with her daily activities, that the ALJ properly considered the medical opinions and that there was no clear evidence that Plaintiff's impairments met a listing. The Court disagrees with the Commissioner, as it finds that the ALJ failed to address the issue of migraine headaches and erred at step two. As is explained below, the ALJ's analysis contains consequential error.

A. Step Two (Severe Impairment): Plaintiff establishes consequential error.

Plaintiff argues that the ALJ erred at step two by failing to evaluate whether her migraine headaches are a severe impairment. The Court agrees.

143 F.3d 383, 386 (8th Cir. 1998) ("An ALJ's failure to cite specific evidence does not indicate that such evidence was not considered[.]").

1 1. Standard

2 At step two of the sequential process, the ALJ determines whether the
3 claimant suffers from a “severe” impairment, i.e., one that significantly limits her
4 physical or mental ability to do basic work activities.¹⁵ This involves a two-step
5 process: 1) determining whether the claimant has a medically determinable
6 impairment and 2), if so, determining whether the impairment is severe.¹⁶

7 Neither a claimant’s statement of symptoms, nor a diagnosis, nor a medical
8 opinion sufficiently establishes the existence of an impairment.¹⁷ Rather, “a
9 physical or mental impairment must be established by objective medical evidence
10 from an acceptable medical source.”¹⁸ Evidence obtained from the “application of a
11 medically acceptable clinical diagnostic technique, such as evidence of reduced joint
12 motion, muscle spasm, sensory deficits, or motor disruption” is considered objective
13 medical evidence.¹⁹ If the objective medical signs and laboratory findings

17 ¹⁵ 20 C.F.R. §§ 404.1520(c), 416.920(c).

18 ¹⁶ *Id.* §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii).

19 ¹⁷ *Id.* §§ 404.1521, 416.921.

20 ¹⁸ *Id.* §§ 404.1521, 416.921.

21 ¹⁹ 3 Soc. Sec. Law & Prac. § 36:26, Consideration of objective medical evidence (2019).

22 *See also* 20 C.F.R. §§ 404.1502(f), 416.902(k), 416.913(a)(1).

1 demonstrate the claimant has a medically determinable impairment,²⁰ the ALJ
 2 must then determine whether that impairment is severe.²¹

3 The severity determination is discussed in terms of what is *not* severe.²² A
 4 medically determinable impairment is not severe if the “medical evidence
 5 establishes only a slight abnormality or a combination of slight abnormalities
 6 which would have no more than a minimal effect on an individual’s ability to
 7 work.”²³ Because step two is simply to screen out weak claims,²⁴ “[g]reat care
 8 should be exercised in applying the not severe impairment concept.”²⁵

11 ²⁰ “Signs means one or more anatomical, physiological, or psychological
 12 abnormalities that can be observed, apart from [a claimant’s] statements
 13 (symptoms).” *Id.* §§ 404.1502(g), 416.902(l).

14 Laboratory findings means one or more anatomical, physiological, or
 15 psychological phenomena that can be shown by the use of medically
 16 acceptable laboratory diagnostic techniques. Diagnostic techniques
 17 include chemical tests (such as blood tests), electrophysiological
 18 studies (such as electrocardiograms and electroencephalograms),
 19 medical imaging (such as X-rays), and psychological tests.

20 *Id.* §§ 404.1502(c), 416.902(g).

21 ²¹ *See* Soc. Sec. Ruling (SSR) 85-28 at *3 (1985).

22 ²² *Smolen v. Chater*, 80 F.3d 1273, 1290 (9th Cir. 1996).

23 ²³ *Id.*; *see* SSR 85-28 at *3.

24 ²⁴ *Smolen*, 80 F.3d at 1290.

25 ²⁵ SSR 85-28 at *4.

1 Step two “is not meant to identify the impairments that should be taken into
2 account when determining the RFC” as step two is meant *only* to screen out weak
3 claims, whereas the crafted RFC must take into account all impairments, both
4 severe and non-severe.²⁶

5 2. Plaintiff's Testimony

6 Plaintiff provided testimony regarding migraine headaches and “daily
7 headaches” both in written form and during her hearing testimony.

8 a. Written Testimony

9 On May 21, 2021, Plaintiff submitted an undated Adult Function Report.²⁷
10 Plaintiff said that she lived in an apartment with family, felt personally attacked
11 when criticized, gets panic attacks in crowds, does not deal with stress well, and
12 has difficulty getting out of bed due to depression.²⁸ Plaintiff said that she cares for
13 her son, and cleans, makes meals, or goes to the store as needed; that her mother
14 helps her; and that she has difficulty with falling and staying asleep and with
15 fatigue.²⁹ She said that she needs frequent reminders to do things and that she sets
16 alarms on her phone but needs additional reminders.³⁰ She said she makes meals
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18 ²⁶ *Buck v. Berryhill*, 869 F.3d 1040, 1048–49 (9th Cir. 2017).

19 ²⁷ AR 305-312.

20 ²⁸ AR 305.

21 ²⁹ AR 306.

22 ³⁰ AR 307.

1 such as sandwiches, cheeseburgers and frozen meals a few times a day and that
2 she is does not like to use the stove because it makes her nervous.³¹ She does
3 housework such as laundry, dishes, mopping, vacuuming, and dusting; but she will
4 not do outside work in the sun and she needs to be reminded to do her chores.³²
5 Plaintiff will go outside but will not leave home unless necessary and reported that
6 she walks or gets a ride when she goes out because she does not have a license.³³
7 She said that she shops for groceries in the store once a month and shops online for
8 diapers and household items, and that she is able to count change and pay bills.³⁴
9 Plaintiff said her hobbies are reading, coloring and crafts, and that she does them a
10 couple times a week but does not have much ambition for anything else.³⁵ She said
11 that she texts a friend daily and sees the friend once a week in person; that she
12 goes to church and a support group weekly; and that she gets nervous around
13 others.³⁶

14 Plaintiff said her conditions affect her ability to lift, bend, walk, remember
15 things, concentrate and understand; and explained that she can lift 20 pounds and
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17 ³¹ *Id.*

18 ³² *Id.*

19 ³³ AR 308.

20 ³⁴ *Id.*

21 ³⁵ AR 309.

22 ³⁶ *Id.*

1 walk for up to a mile and that bending hurts her back.³⁷ She said she can follow
2 written instructions well but forgets spoken instructions quickly, and that when
3 she worked at McDonalds there were multiple complaints about her work.³⁸ She
4 said she does not handle stress or change well and that she is scared of bodies of
5 water, fire, and electricity.³⁹ She wears glasses daily.⁴⁰

6 *b. Hearing Testimony*

7 On May 11, 2023, Plaintiff appeared with her attorney for a hearing before
8 ALJ Jo Hoenninger.⁴¹ Plaintiff and a vocational expert (VE) testified.⁴² Plaintiff
9 said she was 5'1" tall and weighed 230 pounds.⁴³ She lives with her mother and
10 son, and was currently receiving TANF, food stamps, and Medicaid.⁴⁴ She said that
11 she did not have a driver's license, and walks to the clinic or grocery store or has
12 occasionally used medical transportation for medical appointments.⁴⁵ She has a
13

14 ³⁷ AR 310.

15 ³⁸ *Id.*

16 ³⁹ AR 311.

17 ⁴⁰ *Id.*

18 ⁴¹ AR 46-76.

19 ⁴² *Id.*

20 ⁴³ AR 52.

21 ⁴⁴ AR 53.

22 ⁴⁵ AR 54.

1 GED and a certification as a phlebotomy technician.⁴⁶ She worked for two weeks in
2 a grocery store but left because she moved.⁴⁷ She said she has not volunteered since
3 July 2018, has not received unemployment, and has not applied for any jobs.⁴⁸ She
4 said she cannot get a job because she has a bad record and she would need too
5 many accommodations from an employer.⁴⁹ She said she was on a mood stabilizer
6 and was supposed to start another but so far the mood stabilizer was not effective
7 after taking it of a couple months.⁵⁰ She said she smokes but has not used alcohol
8 since 2019, and that she also used marijuana until 2019.⁵¹

9 As to household chores, Plaintiff said she cares for her son, goes the store
10 twice week as needed, cleans the litter box, vacuums the floor, and puts groceries
11 away.⁵² Plaintiff said she does not cook, do dishes, do laundry, or do gardening or
12 lawn chores but cleans the tub.⁵³ She said she had been going to Grief Share but
13 that she did not visit family or friends, and only has one friend who will come over
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15 ⁴⁶ *Id.*

16 ⁴⁷ AR 55.

17 ⁴⁸ AR 55-56.

18 ⁴⁹ AR 56.

19 ⁵⁰ *Id.*

20 ⁵¹ AR 56-57.

21 ⁵² AR 57-58.

22 ⁵³ AR 58.

1 once or twice a month.⁵⁴ She said she does not go out to eat or to movies and her
2 hobby is crafting, like jewelry making.⁵⁵ She has the TV on all day because she
3 does not like silence, she does not listen to music, and she will read posts on
4 Facebook but does not post herself.⁵⁶ Plaintiff said she worked at McDonald's for a
5 couple weeks but had to leave because she was having trouble with incontinence
6 because of her colitis and could not walk to and from work.⁵⁷ She said she still has
7 problems from colitis.⁵⁸ Plaintiff said that because of the Chiari malformation she
8 had daily headaches and had migraines three times a week.⁵⁹ She said the
9 migraines feel like a spike in her head and when she has time she needs to lay
10 down for an hour and will end up falling asleep.⁶⁰ She said that medication does
11 not help, only rest helps.⁶¹

12 Plaintiff testified that her depression and anxiety are constant and that her
13 depression makes her so lacking in motivation that she cannot even go outside to
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15 ⁵⁴ AR 58-59.

16 ⁵⁵ AR 59.

17 ⁵⁶ AR 59-60.

18 ⁵⁷ AR 61.

19 ⁵⁸ *Id.*

20 ⁵⁹ *Id.*

21 ⁶⁰ AR 61-62.

22 ⁶¹ AR 62.

1 play with her son.⁶² Her anxiety makes her afraid of everything.⁶³ She said her
2 mother helps her care for her son and will get bottles, do laundry, cook, and watch
3 Plaintiff's son while Plaintiff lies down. ⁶⁴

4 3. Relevant Medical Records

5 There is little evidence in the record regarding treatment for migraine
6 headaches and headaches, but the record is clear as to their existence. Notably,
7 the medical record references "headaches" in 140 places and references "migraines"
8 in 158 places.

9 In January 2018, prior to her alleged onset date and date last insured,
10 Plaintiff was examined by John Baumeister, DO, who noted that she presented
11 with a headache and report of numbness during her visit.⁶⁵ At an appointment in
12 March 2018, Plaintiff presented to Dr. Baumeister with complaints of a headache,
13 poor balance, and numbness.⁶⁶ When seen by Dr. Baumeister on April 20, 2018,
14 Plaintiff was experiencing a migraine headache as well as dizziness and poor
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18 ⁶² *Id.*

19 ⁶³ AR 62-63.

20 ⁶⁴ AR 63.

21 ⁶⁵ AR 370, 372.

22 ⁶⁶ AR 395.

1 balance.⁶⁷ At an August 2018 appointment with Dr. Baumeister, Plaintiff again
2 was experiencing a migraine headache.⁶⁸

3 On October 11, 2018, Plaintiff reported to ARNP Rebecca Nelson that she
4 had discontinued Topiramate 4-5 months prior because despite taking 100 Mg 3
5 times a day she had no improvement in her migraine headaches.⁶⁹ She reported
6 that she had also taken Depakote in the past for migraines without any
7 improvement.⁷⁰ ARNP Nelson assessed that Plaintiff suffered “chronic daily
8 headaches.”⁷¹

9 On December 11, 2018, Mickey Cates, PA-C, documented that Plaintiff
10 suffers from both migraines and fibromyalgia secondary to Arnold Chiari syndrome
11 and mild cord compression.⁷² PA Cates also noted that Plaintiff suffered daily
12 headaches.⁷³

13 At an appointment with ARNP Nelson on March 21, 2019, Plaintiff was
14 complaining of a migraine and advised ARNP Nelson that she was not taking
15

16 ⁶⁷ AR 446.

17 ⁶⁸ AR 462.

18 ⁶⁹ AR 472.

19 ⁷⁰ Id.

20 ⁷¹ AR 473.

21 ⁷² AR 913.

22 ⁷³ AR 476.

1 medication for the migraines because it had been unhelpful but was trying to
2 control the migraines by drinking two liters of caffeinated soda throughout the day
3 each day.⁷⁴ ARNP Nelson opined that she had not been on a high enough dose of
4 Topamax to control the migraines and told Plaintiff to stop drinking caffeine and to
5 take a higher dosage of Topamax, which she then prescribed.⁷⁵

6 In June 2020, Lacey Villamar of Comprehensive Healthcare noted that
7 Plaintiff suffered from “frequent headaches.”⁷⁶ On October 15, 2021, Plaintiff again
8 presented to Dr. Baumeister with a migraine headache with poor coordination and
9 “shaking.”⁷⁷ An intake form completed on January 4, 2023, by Mary Kelley of KVH
10 Family Medicine indicated that Plaintiff’s records showed she suffered migraines
11 frequently and had been prescribed Topamax.⁷⁸

12 4. Analysis

13 As an initial matter, the Court notes that the ALJ never even mentioned
14 headaches or migraines in her decision. When addressing Plaintiff’s Arnold-Chiari
15 malformation, the ALJ stated:

16 A cervical spine MRI revealed a mild Chiari malformation and mild
17 C5-C6 cord compression, and the claimant was taking Topiramate

18 ⁷⁴ AR 502.

19 ⁷⁵ *Id.*

20 ⁷⁶ AR 1026.

21 ⁷⁷ AR 1116.

22 ⁷⁸ AR 829.

1 (Topamax) to treat associated pain. (Ex. 1F, p. 15). The Topiramate
2 dosage increased over time.⁷⁹

3 Topamax is used as an anticonvulsant for those who suffer seizures or for
4 the treatment of migraine headaches.⁸⁰ The record was clear that Plaintiff was
5 prescribed Topamax because she had migraine headaches and the ALJ failed to
6 directly address Plaintiff's migraine headaches and instead referred to "associated
7 pain."

8 The ALJ treated the March 2019 medical notes from ARNP Nelson in a
9 similar fashion. As noted above, in March 2019, ARNP Nelson opined that
10 Plaintiff's migraines had not been treated with a proper dosage of Topamax and
11 advised Plaintiff that her attempts to control migraine headaches with the use of
12 caffeine should be replaced with a proper dosage of Topamax.⁸¹ The ALJ
13 referenced those notes but characterized the record as follows:

14 The claimant sought medication refills in March 2019 because she
15 was moving to upstate New York. (Ex. 2F, p. 36). She received
16 Topiramate, metformin, her ProAir inhaler, and Seasonique. Rebecca
17 Nelson, ARNP, advised the claimant to stop drinking soda. Although
18 lab work did not confirm diabetes, Ms. Nelson thought metformin
19 would help with weight loss. (Ex. 2F, p. 39).⁸²

19 ⁷⁹ AR 24.

20 ⁸⁰ [Topamax: Uses, Dosage, Side Effects - Drugs.com](#) (last viewed August 15, 2024)

21 ⁸¹ AR 502.

22 ⁸² AR 24-25.

1 Here, the inference given by the ALJ was that ARNP Nelson advised
2 Plaintiff not to drink soda due to weight loss issues. That is erroneous. The record
3 was clear that Plaintiff drank caffeinated soda in an attempt to control her
4 migraines and that ARNP Nelson advised her not to drink soda because she
5 wanted to prescribe what she thought would be a therapeutic dosage of Topamax
6 that would control the headaches.

7 The ALJ also failed to understand the significance of the fact that Plaintiff's
8 migraines were often associated with numbness, according to Dr. Baumeister.⁸³
9 Migraine aura is the term to define sensory and visual disturbances which are
10 associated with migraines and can include blind spots, vision changes, sensitivity
11 to light and sound, and numbness and tingling in the hands and face.⁸⁴ The fact
12 that a migraine is associated with aura is relevant to the disabling nature of the
13 migraine or non-headache sensory event because blind spots, vision changes, and
14 photo sensitivity can cause safety issues in the workplace and are likely to
15 interfere with the ability to work. In her decision, the ALJ failed to address
16 Plaintiff's migraine aura symptoms entirely and failed to consider the extent that
17 those symptoms are likely to interfere with the ability to work. This was error.

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20 ⁸³ AR 370, 372, 395, 446, 1116.

21 ⁸⁴ Mayo Clinic, *Migraine with Aura – Symptoms and Causes*, www.mayoclinic.org
22 (August 15, 2024).

1 Here, the ALJ has ignored clear evidence that Plaintiff suffered from
2 migraine headaches and failed to consider evidence of migraines both with and
3 without aura. This is error.

4 *a. The ALJ's duty to develop the record*

5 “The ALJ always has a special duty to fully and fairly develop the record” to
6 make a fair determination as to disability, even where, as here, “the claimant is
7 represented by counsel.”⁸⁵ This “affirmative responsibility to develop the record” is
8 necessary to ensure that the ALJ’s decision is based on substantial evidence.⁸⁶

9 On this record, without a treating or examining medical opinion, the Court
10 “cannot conclude that the ALJ’s decision was based on substantial evidence . . .
11 [when taking] the totality of [the claimant’s] medical conditions into account.”⁸⁷

12 Because there is no medical opinion of record providing for Plaintiff’s
13 functional limitations during migraine and migraine aura, the record is
14 undeveloped. This stands as a failure to develop the record.

20 ⁸⁵ *Celaya v. Halter*, 332 F.3d 1177, 1183 (9th Cir. 2003) (cleaned up).

21 ⁸⁶ *Id.* at 1184.

22 ⁸⁷ *Id.*

1 5. Summary

2 Because the ALJ did not properly consider whether Plaintiff's migraine
3 headaches and migraine aura were severe impairments, a remand is warranted.
4 Moreover, because there is no medical opinion of record assessing Plaintiff's
5 functional limitations based on such impairments, the record is undeveloped. On
6 remand, the ALJ is directed to develop the record as necessary either by obtaining
7 a consultative examination or obtaining the testimony of a medical expert.

8 **B. Medical Opinion: Plaintiff establishes consequential error**

9 Plaintiff argues the ALJ erred in her evaluation of the medical opinions.⁸⁸
10 Specifically, Plaintiff argues that the ALJ erred in crediting Dr. Water's medical
11 opinions to a DSHS staff member and also erred in her analysis of Dr. Morgan's
12 opinions. It is notable that in his response brief the Commissioner failed to
13 respond to Plaintiff's argument that the ALJ attributed Dr. Waters' opinions to a
14 DSHS staff member. It is surprising that the Commissioner failed to address a
15 clear and serious error in the decision that the ALJ attributed the opinions of a
16 treating psychologist to a layperson who is not even an acceptable medical source.

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19 ⁸⁸ An ALJ must consider and articulate how persuasive she found each medical
20 opinion, including whether the medical opinion was consistent with and supported
21 by the record. 20 C.F.R. §§ 404.1520c(a)-(c), 416.920c(a)-(c); *Woods v. Kijakazi*, 32
22 F.4th 785, 792 (9th Cir. 2022).

1 The Court agrees with Plaintiff that the ALJ's error was consequential and
2 concludes that remand is warranted.

3 1. Standard

4 The ALJ was required to consider and evaluate the persuasiveness of the
5 medical opinions and prior administrative medical findings.⁸⁹ The factors for
6 evaluating the persuasiveness of medical opinions and prior administrative
7 medical findings include, but are not limited to, supportability, consistency,
8 relationship with the claimant, and specialization.⁹⁰ Supportability and consistency
9 are the most important factors,⁹¹ and the ALJ must explain how she considered the
10 supportability and consistency factors when reviewing the medical opinions and
11 support her explanation with substantial evidence.⁹² The ALJ may consider, but is
12 not required to discuss the following additional factors: the source's relationship to
13 Plaintiff such as length of the treatment, purpose of the treatment relation and
14 whether the source examined Plaintiff, as well as whether the source had advanced
15

16 ⁸⁹ 20 C.F.R. §§ 404.1520c(a), (b); 416.920c(a), (b).

17 ⁹⁰ 20 C.F.R. §§ 404.1520c(c)(1)-(5); 416.920c(c)(1)-(5).

18 ⁹¹ *Id.* §§ 404.1520c(b)(2); 416.920c(b)(2).

19 ⁹² *Id.* §§ 404.1520c(b)(2); 416.920c(b)(2); *Woods v. Kijakazi*, 32 F.4th at 785 ("The
20 agency must articulate . . . how persuasive it finds all of the medical opinions from
21 each doctor or other source and explain how it considered the supportability and
22 consistency factors in reaching these findings.") (cleaned up).
23

1 training or experience to specialize in the area of medicine in which the opinion
 2 was being given.⁹³ When considering the ALJ's findings, the Court is constrained to
 3 the reasons and supporting explanation offered by the ALJ.⁹⁴

4 2. Relevant Medical Records

5 Because Plaintiff argues that the ALJ erred when evaluating the medical
 6 opinions relating to Plaintiff's mental impairments, the Court recites only the
 7 medical opinions that are relevant to that issue.

8 a. Dr. Moore

9 On July 31, 2021, at the initial stage, Plaintiff's file was reviewed by state
 10 agency evaluator Carol Moore, PhD.⁹⁵ Dr. Moore opined that overall Plaintiff had
 11 a moderate limitation in the following four functional areas: understand, remember
 12 or apply information; interact with others; concentrate, persist or maintain pace;
 13 and adapt or manage oneself.⁹⁶ Dr. Moore opined that Plaintiff's ability to
 14 understand and remember detailed instructions was moderately limited; that her
 15 ability to carry out short and simple instructions was moderately limited; that her
 16 ability to maintain attention and concentration was moderately limited; that her

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 18 ⁹³ Id.

19 ⁹⁴ See *Burrell v. Colvin*, 775 F.3d 1133, 1138 (9th Cir. 2014) (recognizing court
 20 review is constrained to the reasons the ALJ gave).

21 ⁹⁵ AR 83.

22 ⁹⁶ AR 82.

1 ability to work in coordination with her proximity to others without being
2 distracted was moderately limited; and that her ability to complete a normal work
3 day or work week was moderately limited.⁹⁷ Dr. Moore also opined that Plaintiff
4 would be moderately limited in the ability to interact with the general public, to get
5 along with coworkers or peers, to respond appropriately change in the workplace,
6 and to set realistic goals.⁹⁸ Dr. Moore explained that Plaintiff would be capable of
7 only brief and superficial interaction with others and would be able to respond to
8 infrequent change in the workplace.⁹⁹

9 *b. Dr. Eisenhauer*

10 On March 2, 2022, at the reconsideration stage, Plaintiff's file was reviewed
11 by state agency evaluator Renee Eisenhauer, PhD.¹⁰⁰ Dr. Eisenhauer opined that
12 overall Plaintiff had a mild limitation in the functional areas of understand,
13 remember or apply information; and had a moderate limitation in the following
14 three functional areas: interact with others; concentrate, persist or maintain pace;
15 and adapt or manage oneself.¹⁰¹ Dr. Eisenhauer opined that Plaintiff had a
16 moderate limitation in the following functions: maintain attention and
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18 ⁹⁷ AR 85-86.

19 ⁹⁸ AR 86.

20 ⁹⁹ *Id.*

21 ¹⁰⁰ AR 105.

22 ¹⁰¹ *Id.*

1 concentration for extended periods; perform activities in a schedule, maintain
2 attendance, and be punctual; and complete a normal work day or work week
3 without interruption.¹⁰² Dr. Eisenhower opined that Plaintiff would have a
4 moderate limitation in interacting with the public and in responding to changes in
5 the workplace.¹⁰³ Dr. Eisenhower explained that Plaintiff should be limited to
6 occasional incidental contact with the public and to occasional changes.¹⁰⁴
7 Dr. Eisenhower opined that there was insufficient evidence to evaluate the claim on
8 or before the date last insured.¹⁰⁵

9 *c. Dr. Morgan (first examination)*

10 On January 8, 2021, David Morgan, PhD, examined Plaintiff at the request
11 of the Washington State Department of Social Services.¹⁰⁶ Dr. Morgan reviewed
12 DSHS records prior to the examination.¹⁰⁷ Dr. Morgan's report included a
13 psychosocial history, treatment history, education and work history, substance use
14 history, mental status examination, diagnosis, prognosis, and medical source
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17 ¹⁰² AR 109.

18 ¹⁰³ *Id.*

19 ¹⁰⁴ *Id.*

20 ¹⁰⁵ AR 116.

21 ¹⁰⁶ AR 566-570.

22 ¹⁰⁷ AR 566.

1 statement.¹⁰⁸ Plaintiff reported that she had mental health issues for ten years and
2 described an episode a year prior of drinking alcohol, reported that when depressed
3 she did not want to do anything and could not concentrate, and stated that she
4 worries all the time.¹⁰⁹ Plaintiff reported that she was in counseling but not taking
5 psychotropic medication because she was breastfeeding.¹¹⁰ Plaintiff reported that
6 she had a GED and phlebotomy training and said she had worked in a bakery, a
7 deli, and a fast food place but had not worked since 2018.¹¹¹

8 On mental status examination, Plaintiff had normal speech, anxious mood,
9 and no abnormality in the following: thought process, orientation, perception,
10 memory, fund of knowledge, concentration, abstract thought, insight, or
11 judgement.¹¹² Dr. Morgan diagnosed Plaintiff with Generalized Anxiety Disorder
12 and Major Depressive Disorder, recurrent episode, moderate.¹¹³ Dr. Morgan opined
13 that Plaintiff would have a moderate limitation in the following activities:
14 understand, remember, and persist in following detailed instructions; learn new
15 tasks; perform routine tasks without special supervision; make simple work related

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17 ¹⁰⁸ AR 566-570.

18 ¹⁰⁹ AR 566.

19 ¹¹⁰ AR 566-567.

20 ¹¹¹ AR 567.

21 ¹¹² AR 570.

22 ¹¹³ AR 567.

1 decisions; ask simple questions or request assistance; communicate or perform
2 effectively in a work setting; and set realistic goals and plan independently.¹¹⁴

3 Dr. Morgan opined that Plaintiff would have a marked limitation in the following
4 abilities: perform activities within a schedule, maintain attendance, and be
5 punctual; adapt to changes in a work setting; maintain appropriate behavior; and
6 complete a normal work day or work week without interruption from symptoms.¹¹⁵

7 Dr. Morgan opined that Plaintiff's limitations were not the result of substance use
8 and would last at least 12 months.¹¹⁶

9 *d. Dr. Waters*

10 On January 13, 2021, Christopher Waters, PhD, and Plaintiff's primary
11 treating mental health source, completed a Documentation Form for Medical or
12 Disability Condition, at the request of a Washington State Department of Social
13 and Health Services staff member named Amber Ladiges.¹¹⁷ The ALJ incorrectly
14 attributed the form as having been authored by Ms. Ladiges, who is not a licensed
15 mental health provider and who works as a Social Services Specialist for the State
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19 ¹¹⁴ AR 568.

20 ¹¹⁵ *Id.*

21 ¹¹⁶ *Id.*

22 ¹¹⁷ AR 573-575.

1 of Washington.¹¹⁸ Dr. Waters wrote that Plaintiff has the following diagnosis:
2 bipolar I disorder; generalized anxiety disorder, social anxiety disorder, special
3 education services for math and read, and a reported history of Asperger's
4 Syndrome.¹¹⁹

5 Dr. Waters wrote:

6 Patient's mood instability and anxiety significantly interfere with her
7 ability to learn and work outside the home. She becomes severely
8 anxious around others. She has difficulties communicating her needs.
She can be manipulated by others. She has difficulty establishing
routines that are consistent enough to work.¹²⁰

9 Dr. Waters stated that Plaintiff took psychotropic medication in the past but was
10 temporarily not taking them because she was breastfeeding, but said she still
11 attends psychotherapy twice a month.¹²¹

12 On June 21, 2021, Plaintiff was examined by Dr. Water who noted that she
13 had a blunted affect; was reserved but spoke; had a mildly depressed mood; had
14 mild anxiety; was oriented, organized, and goal-oriented; appeared to have low
15 energy quite often; had monotone speech, and had fair insight and
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18 ¹¹⁸ OpenPayrolls. [www.openpayrolls.com/Amber Ladiges-107829515](https://www.openpayrolls.com/Amber-Ladiges-107829515). (Last viewed
19 August 15, 2024).

20 ¹¹⁹ AR 573.

21 ¹²⁰ AR 573.

22 ¹²¹ AR 574.

1 judgment.¹²² Dr. Waters opined that Plaintiff appeared to be able to function well
2 enough to care for her child but not to work.¹²³ On July 21, 2021, Plaintiff
3 presented to Dr. Waters.¹²⁴ On mental status examination, Plaintiff was
4 cooperative but was reserved and had little eye contact; she had regular speech;
5 her mood was depressed and her affect was blunted; she had a logical and goal-
6 directed thought process; she had no delusions, hallucinations or suicidal thoughts;
7 her attention and concentration were intact and she was oriented; her memory was
8 challenged; and her insight and judgment were fair.¹²⁵ Dr. Waters assessed
9 Plaintiff with social anxiety disorder; bipolar I disorder, depressed, moderate; and
10 generalized anxiety disorder.¹²⁶ Dr. Waters stated that Plaintiff had chronic
11 symptoms of depression, anxiety, and irritability, but opined that she seemed to
12 function better with a low stimulation environment, no work, and limited social
13 expectations.¹²⁷

17 ¹²² AR 641.

18 ¹²³ *Id.*

19 ¹²⁴ AR 645.

20 ¹²⁵ AR 646-647.

21 ¹²⁶ AR 647.

22 ¹²⁷ *Id.*

1 e. Dr. Schultz

2 On February 20, 2022, Plaintiff was examined by consultative examiner
3 Jenifer Schultz, PhD, at the request of the Commissioner.¹²⁸ Dr. Schultz reviewed
4 medical records from Klickitat Valley Health, Comprehensive Healthcare, and
5 Family Medicine.¹²⁹ Plaintiff reported to Dr. Schultz that her main complaints are
6 an Arnold-Chiari malformation, lupus, arthritis in her back, polycystic ovary
7 syndrome, and hidradenitis suppurativa.¹³⁰ She said that she cannot hit her head
8 and senses movement in her brain, that she lacks fluid in her skull, that she
9 cannot be in the sun because of her lupus, that her back pain was currently a 5/10,
10 that her polycystic ovary syndrome caused occasional cramping, and that her skin
11 condition causes boils and cysts on her skin.¹³¹ Plaintiff said she was diagnosed
12 with Asperger's syndrome and that she has only one friend, and cannot tolerate
13 loud noises but has no other sensory issues.¹³² Plaintiff also said she has anxiety
14 and worries all the time, and she limits going outside because she has panic
15 attacks when she does and worries she will be hit by a car or attacked by an
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18 ¹²⁸ AR 710-714.

19 ¹²⁹ AR 711.

20 ¹³⁰ AR 710.

21 ¹³¹ *Id.*

22 ¹³² *Id.*

1 animal.¹³³ Plaintiff also reported that she has bipolar disorder and that when
2 manic she will have spending sprees and not be able to focus.¹³⁴ She said that when
3 depressed she will have no energy and does not want to get out of bed.¹³⁵

4 Plaintiff reported mental health treatment since she was 16 years old and
5 was hospitalized for cutting herself, and said her symptoms have not changed in
6 the last 6 months and that she did not think treatment was helpful.¹³⁶ Plaintiff
7 reported going out increases anxiety and getting in bed relieves it; and said she
8 abused alcohol at 17 and 19 years old but currently does not use alcohol or
9 substances.¹³⁷ Plaintiff reported that she smokes half a pack of cigarettes a day and
10 drinks 2 liters of caffeinated beverages a day.¹³⁸ Plaintiff reported that she was
11 raised by abusive grandparents, worked for two weeks at a McDonald's before
12 being fired, went to the eighth grade in special education but obtained a GED, had
13 no criminal history, and currently was taking no medication.¹³⁹

16 ¹³³ AR 711.

17 ¹³⁴ *Id.*

18 ¹³⁵ *Id.*

19 ¹³⁶ AR 711.

20 ¹³⁷ *Id.*

21 ¹³⁸ AR 711-712.

22 ¹³⁹ AR 712.

1 On mental status examination, Plaintiff was appropriately dressed; was
2 cooperative; had constricted affect and congruent mood; had no suicidal or
3 homicidal ideation; had normal speech; was oriented to day and year but not place;
4 had intact memory; had limited fund of knowledge; had adequate concentration;
5 was not able to complete abstract thinking tasks; and had limited insight and
6 judgment.¹⁴⁰ Plaintiff reported that her mother does most household chores but she
7 is able to pay bills and take care of her personal needs; that she does not attend
8 church or social groups and only has one friend who she sees weekly; and engages
9 in hobbies of painting, making jewelry, and drawing but does not finish them.¹⁴¹

10 Dr. Schultz diagnosed Plaintiff with Bipolar I, Unspecified Anxiety Disorder,
11 and Rule out for Asperger's Syndrome.¹⁴² Dr. Schultz opined that Plaintiff could
12 think in an abstract manner and reason; has fair understanding and intact
13 memory; has a fair ability to concentrate; does not finish her tasks, indicating she
14 is not persistent; has limited social interaction; and has poor social skills, daily
15 living skills, and occupational adaptation.¹⁴³

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19 ¹⁴⁰ AR 712-713.

20 ¹⁴¹ AR 713.

21 ¹⁴² AR 713-714.

22 ¹⁴³ AR 714.

1 *f. Dr. Morgan (second examination)*

2 On January 31, 2023, Plaintiff was examined for a second time by David
 3 Morgan, PhD, at the request of the Washington State Department of Social
 4 Services.¹⁴⁴ Prior to the examination, Dr. Morgan reviewed Plaintiff's DSHS
 5 records and his prior evaluation.¹⁴⁵ Plaintiff reported that her depression was the
 6 same since her last examination, but her anxiety was worse.¹⁴⁶ Plaintiff described
 7 that intrusive thoughts interrupted her sleep and affected her concentration, and
 8 that due to depression she had no motivation and felt hopeless but not suicidal.¹⁴⁷
 9 Plaintiff reported that she was receiving counseling and taking psychotropic
 10 medication; was living with her mother; and that she spent time at home taking
 11 care of her three year old son.¹⁴⁸ On mental status examination, Plaintiff had
 12 normal speech, anxious mood, and no abnormality in the following: thought
 13 process, orientation, perception, memory, fund of knowledge, concentration,
 14 abstract thought, insight or judgement.¹⁴⁹

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17 ¹⁴⁴ AR 1312-1316.

18 ¹⁴⁵ AR 1312.

19 ¹⁴⁶ *Id.*

20 ¹⁴⁷ *Id.*

21 ¹⁴⁸ AR 1312-1313.

22 ¹⁴⁹ AR 1315-1316.

1 Dr. Morgan opined that Plaintiff would have a moderate limitation in the
 2 following activities: understand, remember, and persist in following detailed
 3 instructions; learn new tasks; perform routine tasks without special supervision;
 4 make simple work related decisions; ask simple questions or request assistance;
 5 communicate or perform effectively in a work setting; and set realistic goals and
 6 plan independently.¹⁵⁰ Dr. Morgan opined that Plaintiff would have a marked
 7 limitation in the following abilities: perform activities within a schedule, maintain
 8 attendance, and be punctual; adapt to changes in a work setting; maintain
 9 appropriate behavior; and complete a normal work day or work week without
 10 interruption from symptoms.¹⁵¹ Dr. Morgan opined that Plaintiff's limitations were
 11 not the result of substance use and would last at least 12 months.¹⁵²

12 3. Analysis

13 a. The ALJ's consideration of Dr. Waters' January 13, 2021 14 opinions

15 As was noted above, on January 13, 2021, Dr. Waters completed a
 16 Documentation Form for Medical or Disability Condition.¹⁵³ At the time that
 17
 18

19 ¹⁵⁰ AR 1314.

20 ¹⁵¹ *Id.*

21 ¹⁵² *Id.*

22 ¹⁵³ AR 573-575.

1 Dr. Waters completed the form, he was Plaintiff's primary mental health treating
2 source and had been seeing her twice a month on a regular basis.

3 The ALJ articulated her consideration of the opinions as follows:

4 On a DSHS form dated January 2021, Amber Ladiges listed diagnoses
5 of Bipolar I Disorder, Generalized Anxiety Disorder, Social Anxiety
6 Disorder, a reported history of special education services, and a
7 reported history of Asperger's disorder. Ms. Ladiges stated that the
8 claimant's mood instability and anxiety significantly interfere with
9 the ability to learn and work outside the home, due to anxiety around
10 others and significant difficulty communicating while anxious. She
11 said the claimant had difficulty communicating her needs and could
12 be manipulated by others. Ms. Ladiges wrote that the claimant could
13 work 0 hours per week. She added that the condition was permanent,
14 though the claimant would resume medications after she stopped
15 breastfeeding. Dr. Waters also signed the form. (Ex. 4F, p. 9-12).

16 This opinion is not persuasive. Apparently, Ms. Ladiges supported
17 this opinion by citing the claimant's statements and the treatment
18 notes from the clinic. However, the conclusion about being unable to
19 work is inconsistent with normal mental status findings during those
20 treatment sessions. (Ex. 2F, p. 53; Ex. 6F, p. 15, 35). Additionally, the
21 claimant told Dr. Waters that the choice between finding a job or
22 filing for disability was difficult because she did not have anyone to
23 watch her child if she started working. (Ex. 2F, p. 93).¹⁵⁴

The ALJ's error in evaluating the opinions is clear and consequential.

Pursuant to the regulations, the ALJ was obliged to consider the source's
relationship with the claimant, and specialization.¹⁵⁵ Clearly, the ALJ did not
properly consider the treating relationship of the individual who authored the
opinions, nor did she consider the fact that the person who authored the opinions

¹⁵⁴ AR 30.

¹⁵⁵ 20 C.F.R. §§ 404.1520c(c)(1)-(5); 416.920c(c)(1)-(5).

1 (Dr. Waters) was a licensed psychologist and held a specialty in the area of
2 medicine for which he was rendering an opinion.

3 Overall, it does not appear that the ALJ gave much consideration to the
4 opinions because on the face of the decision she articulates a belief that the author
5 was Ms. Ladiges. As noted, Ms. Ladiges is not mentioned in the voluminous
6 medical record as a provider of Plaintiff's care. Additionally, there is no indication
7 whatsoever that Ms. Ladiges held any medical license at all or was an acceptable
8 medical source of any type. The ALJ did not articulate any consideration of who
9 Ms. Ladiges was and what her credentials might be, other than an implicit
10 recognition that she was not a physician or psychologist, as she is referred to as
11 Ms. Ladiges, rather than Dr. Ladiges.

12 Additionally, the ALJ articulated that she discounted the opinions because
13 they were inconsistent with mental status evaluations made by Dr. Waters on 3
14 occasions. This reasoning is also flawed. First, the ALJ does not explain why she
15 cites to such a limited number of treatment notes in what is a very lengthy and
16 well-developed record. Additionally, even those limited examinations which appear
17 to have been cherry-picked from the record are not entirely inconsistent with
18 Dr. Waters' opinions. For instance, the mental status examination cited at Exhibit
19 2F, p. 53 indicates that Plaintiff had difficulty with concentration and memory, and
20 that she presented with a depressed mood and blunted affect.¹⁵⁶ This is certainly

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22 ¹⁵⁶ AR 516.

1 not a mental status examination that showed “normal” results. Similarly, the
2 mental status examination cited at Exhibit 6F, p. 15 indicated a blunted affect,
3 depressed and anxious mood, fidgety behavior, social rigidity, and avoidance of eye
4 contact.¹⁵⁷ The mental status examination cited at Exhibit 6F, p. 35 indicated
5 blunted affect, reserved speech, monotone speech, and only fair insight and
6 judgment.¹⁵⁸

7 The ALJ’s consideration of Dr. Waters’ opinions is flawed on its face. The
8 Court concludes that remand is warranted for the ALJ to properly consider the
9 opinion evidence and to evaluate it as to its consistency with the other opinions of
10 record.

11 *b. The ALJ’s consideration of Dr. Morgan’s opinions*

12 In her consideration of both the January 2021 and January 2023 opinions of
13 Dr. Morgan the ALJ provided the same reasoning addressed above that the
14 opinions were inconsistent with the same three mental status examinations cited
15 above. When addressing Dr. Morgan’s opinions, the ALJ articulated that there was
16 a lack of abnormality in “speech, attitude, affect, thought process and content,
17 orientation, perception, memory, fund of knowledge, concentration, abstraction,
18 insight, and judgment.”¹⁵⁹ This statement is simply not supported by the record.

20 ¹⁵⁷ AR 610.

21 ¹⁵⁸ AR 630.

22 ¹⁵⁹ AR 31.

1 4. Summary

2 Because the ALJ erred in attributing the medical opinions of an acceptable
3 medical source who had a long-standing treatment history with Plaintiff to a
4 person with no apparent medical credentials and no treatment relationship to
5 Plaintiff, and did not give good reasons for discounting the opinions of acceptable
6 medical sources, the ALJ has erred. A remand is warranted.

7 **C. Plaintiff's Subjective Complaints: The Court finds the issue moot.**

8 Plaintiff argues the ALJ failed to properly assess her subjective complaints.
9 As discussed above, the ALJ failed to consider Plaintiff's migraine headaches and
10 migraine aura and failed to consider the medical record as a whole when
11 evaluating the medical opinions. Because the Court has remanded the case for
12 consideration of the record as a whole, the ALJ will be required to consider the
13 credibility of Plaintiff's subjective complaints.

14 **D. The Listings: The Court finds the issue moot.**

15 As discussed above, the ALJ failed to consider Plaintiff's migraine headaches
16 and migraine aura and failed to consider the medical record as a whole when
17 evaluating the medical opinions. Because the Court has remanded the case for
18 consideration of the record as a whole, the ALJ will be required to consider the
19 listings.

1 **E. Remand for Further Proceedings**

2 The decision whether to remand a case for additional evidence, or simply to
3 award benefits, is within the discretion of the court.”¹⁶⁰ When the court reverses an
4 ALJ’s decision for error, the court “ordinarily must remand to the agency for
5 further proceedings.”¹⁶¹

6 The Court finds that further development is necessary for a proper disability
7 determination. Here, it is not clear what, if any, additional limitations are to be
8 added to the RFC following a proper consideration of Plaintiff’s migraine
9 headaches. Therefore, the ALJ should either request that Plaintiff attend a
10 consultative examination or obtain testimony from a medical expert pertaining to
11 Plaintiff’s headaches, and then consider any additional evidence presented, and
12 make findings at each of the five steps of the sequential evaluation process.
13 Because the Court notes that the ALJ’s failure to address Plaintiff’s migraine
14 headache in any manner and mischaracterization of treatment notes regarding her
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17 ¹⁶⁰ *Sprague v. Bowen*, 812 F.2d 1226, 1232 (9th Cir. 1987) (citing *Stone v. Heckler*,
18 761 F.2d 530 (9th Cir. 1985)).

19 ¹⁶¹ *Leon v. Berryhill*, 880 F.3d 1041, 1045 (9th Cir. 2017); *Benecke* 379 F.3d at 595
20 (“[T]he proper course, except in rare circumstances, is to remand to the agency for
21 additional investigation or explanation”); *Treichler v. Comm’r of Soc. Sec. Admin.*,
22 775 F.3d 1090, 1099 (9th Cir. 2014).

1 migraine headaches might create an appearance of bias, the Court also orders that
2 a different ALJ should be assigned to hear the case.

3 **IV. Conclusion**

4 Accordingly, **IT IS HEREBY ORDERED:**

- 5 1. The ALJ's nondisability decision is **REVERSED**, and this matter is
6 **REMANDED** to the Commissioner of Social Security for further
7 proceedings pursuant to sentence four of 42 U.S.C. § 405(g) and is to
8 be reassigned to a different ALJ.
- 9 2. The Clerk's Office shall **TERM** the parties' briefs, **ECF Nos. 8 and 9**,
10 enter **JUDGMENT** in favor of **Plaintiff**, and **CLOSE** the case.

11 IT IS SO ORDERED. The Clerk's Office is directed to file this order and
12 provide copies to all counsel.

13 DATED this 19th day of August 2024.

14 

15

EDWARD F. SHEA
16 Senior United States District Judge
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